Supreme Court, U. S.
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IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1656

ALBERT PEREZ, EVANGELINE SALAZAR, and CAROLYN SANCHEZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1979

NO. _____

ALBERT PEREZ, EVANGELINE
SALAZAR, and CAROLYN SANCHEZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED
STATES:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on February 1, 1980. The petition

for rehearing was denied on February 28, 1980.

OPINION BELOW

The February 1, 1980 opinion of the Court of Appeals whose judgment is herein sought to be reviewed not reported but is reprinted in the separate Appendix to this Petition, pp. 14-48.

JURISDICTION

The Judgment of the Court of Appeals was entered February 1, 1980. The Petition for rehearing was denied on February 28, 1980. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254.

QUESTIONS PRESENTED

Once it is shown that Petitioners' constitutional rights to due process and compulsory process are violated by the deportation of alien

witnesses from the jurisdictional limits of the United States by the United States Government prior to Petitioner's right to interview said witnesses, must Petitioners show the prejudice resulting from the unavailability of the deported witnesses.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use, without just compensation."

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF CASE

This is an alien transportating case wherein the Petitioners were arrested on April 22, 1978. At the time of their arrest twenty-two alien

witnesses were also detained. On the same day of the arrest three of the aliens were deported by the United States Immigration Service. On May 2, 1978, an additional eleven aliens were deported. On June 1, 1978, Petitioners were indicted. On June 16, 1978 the Petitioners were, for the first time, given the names and addresses of the previously deported alien witnesses residing in the Republic of Mexico who were not available to be interviewed or deposed by Petitioner's counsel.

The Rulings Below

The district court ruled that the constitutional rights of the Petitioners' had not been violated by the governments unilateral act of deporting the alien witnesses. It ruled that the furnishing of the deported witnesses' names and addresses was sufficient and

that it was incumbent upon the Petitioners to obtain the presence of the deported witnesses. None of the deported witnesses were present at the trial of this case.

The Court of Appeals held that Petitioners' Fifth and Sixth Amendment rights were violated but that reversal was not necessary since Petitioners could not show prejudice that resulted from the unavailability of the deported witnesses. The Court of Appeals refused to accept in tota opinions of cases decided in the Ninth and Seventh Circuits. United States v. Mendez-Rodriguez, 450 F. 2d 1 (9th Cir. 1971) and United States v. Calzada, 579 F.2d 1358 (7th Cir. 1978) cert. dismissed, 439 U.S.920 (1978).

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted To

Resolve The Conflict between the Seventh and Ninth Circuits, jointly, and the Fifth Circuit since their opinions on the same matter differ.

The issue in this case has been decided by three of the Circuit Courts of Appeals. In United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971), the Ninth Circuit was presented with essentially the same type of fact situation present in this case. In the Mendez-Rodriguez case, at page 5 of the opinion, the court noted that the Appellant could not show that the deported witnesses in question would have offered testimony favorable to the defense. The Court said such position was understandable in view of the fact that Appellant was, by Government action, deprived of the opportunity to interview the witnesses. Appellant could not say what, if anything, the

witnesses might say. The Court accepted Appellant's position and refused to indulge in speculation as to whether or not the interviews would, or would not, have been fruitful to the defense. On page 2792 of the opinion in this case, the Fifth Circuit took the opposite position of the Ninth Circuit and stated that Petitioners should give some suggestion as to how the deported witnesses might advance the cause of revealing the truth, a position that Appellant in Mendez-Rodriguez was unable to do and that Petitioners were unable to do in this present case. See Appendix, pp. 33.

The Ninth Circuit further expounded on Mendez-Rodriguez in United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974) and stated, at page 423 of the opinion,

that the vice of the problem encountered in this type of case lies in the unfettered ability of the government to make the decision to deport witnesses.

Petitioners, before the district court, relied upon the two Ninth Circuit cases since there were no other cases directly in point. While Petitioners' case was in the district court the Seventh Circuit decided United States v. Calzada, 579 F.2d 1358 (7th Cir. 1978) cert dismissed, 439 U.S. 920 (1978). In Calzada the view the government asked the Court to adopt is the position taken by the Fifth Circuit: that the Petitioners must show bad faith or undue prejudice to the defendant's case. The Seventh Circuit declined to adopt the aforementioned position. See page 1361 of the opinion.

Due to the positions taken by the

Seventh and Ninth Circuits, jointly, and the Fifth Circuit Petitioners believe that this Petition For Writ Of Certiorari should be granted since individual's constitutional rights are involved and there is a definite conflict between circuits. Petitioners relied upon the case law then outstanding when they pursued this point in the district court. According to the Ninth Circuit, their position was correct and dismissal of the charges could have followed. The same result would now occur within the Seventh Circuit. However, such is not the case in the Fifth Circuit. Hence, the applicability of an individual's constitutional rights on the question raised in this case is determined, at present, on a circuit to circuit basis. Petitioners believe the following paraphrase from Judge Wisdom is appropriate:

We are one nation under one set of laws and should have one interpretation of them.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

Tony Aguilar
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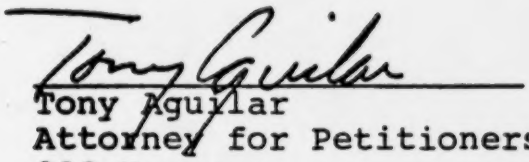
El Paso, Texas 79901

Certificate of Service

I, Tony Aguilar, a member of the Bar of the Supreme Court of the United States and counsel of record for Albert Perez, Evangeline Salazar, and Carolyn Sanchez, Petitioners herein, hereby certify that, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the Petition For Writ Of Certiorari on each of the parties herein, as follows:

On Ms. Le Roy Morgan Jahn, Assistant United States Attorney for the Western District of Texas, by depositing such copies in the United States Post Office, El Paso, Texas, with first class postage prepaid, properly addressed to Ms. Morgan, above-named counsel for the United States of America, at 655 E. Durango Blvd., Suite G-13, San Antonio, Texas 78206.

Dated March 26, 1980.



Tony Aguilar
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UNITED STATES of America,
Plaintiff-Appellee,
v.
Maximo AVILA-DOMINGUEZ, Albert Perez, Evangeline Salazar and Carolyn Sanchez, Defendants-Appellants.

No. 78-5575

United States Court of Appeals
Fifth Circuit

Feb. 1, 1980.

Multiple convictions were returned against defendants by the United States District Court for the Western District of Texas, at El Paso, William S. Sessions, J., for assisting Mexican aliens in illegally entering the United States, and defendants appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) while defendants' constitutional rights were violated by the deportation of alien witnesses before defendants were given an opportunity to interview the witnesses, the convictions would never-

theless be affirmed, since the case was flavored with an element of waiver even though defendants' conduct was not clothed with a full-dress waiver of constitutional rights, and since, more importantly, no suggestion was made as to how the witnesses might have, in the slightest way, helped defendants in the defense of the case, and (2) there was sufficient evidence to support the convictions.

Affirmed.

1. Criminal Law 1182

While defendants' constitutional rights were violated by the deportation of alien witnesses before the defendants were given the opportunity to interview the witnesses, the convictions would nevertheless be affirmed, since the case was flavored with an element of waiver even though defendants' conduct was not

clothed with a full-dress waiver of constitutional rights, and since, more importantly, no suggestion was made as to how the witnesses might have, in the slightest way, helped defendants in the defense of the case. U.S.C.A. Const. Amends. 5, 6.

2. Criminal Law 666 1/2

Defendants have a constitutional right to interview alien witnesses and must be given reasonable notice before the deportation of such witnesses. U.S. C.A. Const. Amends. 5, 6.

3. Indictment and Information
125(51/2)

Fact that alleged conspiracy includes the violation of more than one federal statute does not make the indictment duplicitous.

4. Conspiracy 48

Once a defendant is found guilty of participating in a conspiracy, it is unnecessary that the verdict specify the particular statutory provision which defendant conspired to violate. 18 U.S.C.A. § 371.

5. Arrest 63.4(1)

Constitution does not require that a warrant issue prior to an arrest based on probable cause, even if no exigent circumstances prevented the obtainment of a warrant.

6. Arrest 63.4(8,9)

Agents of the Immigration and Naturalization Service clearly had probable cause to arrest defendants, where an agent testified that he had dealt with the informant on 20 prior occasions and was convinced of his reliability, where the informant's detailed information about

aliens' whereabouts, one defendant's appearance, and the presence of a woman alien accompanied by two children was corroborated by the agents' personal observation soon after surveillance began, and where an agent observed through a window that more people were concealed in camper that he had seen enter. Immigration and Nationality Act, § 274(a)(2, 4), 8 U.S.C.A § 1324(a)(2,4); 18 U.S.C.A. § 371.

7. Arrest 71.1(8)

Searches of defendants incident to their lawful arrests were clearly proper, even though the searches took place at the courthouse rather than at the sites of the arrests.

8. Criminal Law 394.4(4)

Agent had probable cause for search of camper shell, and therefore the testimony of illegal aliens

discovered therein was properly admissible.

9. Conspiracy 23

Essential elements of criminal conspiracy are an agreement between two or more persons to commit a crime and an overt act in furtherance of the agreement by one of the conspirators. 18 U.S.C.A. § 371.

10. Conspiracy 47(1)

Once the existence of a conspiracy is established, there must be substantial evidence that each alleged conspirator knew of, intended to join, and participated in the conspiracy. 18 U.S.C.A. § 371.

11. Conspiracy 47(3)

In prosecution for conspiracy to encourage or induce the entry of illegal aliens into the United States and to transport those aliens within the United

States, there was sufficient evidence to establish the essential elements of conspiracy and defendants' knowledge, intent and participation therein. Immigration and Nationality Act, § 274(a)(2, 4), 8 U.S.C.A. § 1324(a)(2, 4); 18 U.S.C.A. § 371.

12. Aliens 59

Defendant's conviction on six counts of encouraging and inducing aliens' illegal entry into the United States was supported by sufficient evidence. Immigration and Nationality Act, § 274(a)(4), 8 U.S.C.A. § 1324(a)(4).

13. Aliens 59

Evidence that defendant met aliens in Mexico, coordinated their illegal entry into the United States, and was apprehended in El Paso while driving a truck in which they were passengers was sufficient to establish his violation

of statute pertaining to the transportation of illegal aliens within the United States. Immigration and Nationality Act, § 274(a)(2), 8 U.S.C.A. § 1324(a)(2).

Appeals from the United States District Court for the Western District of Texas.

Before WISDOM, AINSWORTH and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This case involves multiple convictions for assisting Mexican aliens in illegally entering the United States. The most serious question is whether the convictions should be reversed because the Government deported potential witnesses before defendants' counsel could interview them. Acknowledging that the Government violated defendants' consti-

tutional rights, we nevertheless affirm the convictions, partly because the case has an element of waiver of those rights, but more importantly because no suggestion has been made to this Court or the district court as to how the witnesses might have, in the slightest way, helped defendants in the defense of this case.

The facts on this controlling issue are undisputed. Acting on an informant's tip and surveillance, an Immigration and Naturalization Service (INS) agent stopped a pickup truck driven by defendant Perez and placed him under arrest. Perez opened the truck's camper shell at the agent's request, and twenty-two illegal aliens were discovered within. In the meantime, another INS agent arrested defendants Avila, Salazar and Sanchez in the near-

by parking lot from which the truck had departed.

The twenty-two aliens were taken into custody of the INS and each was interviewed by an INS agent. The United States Attorney determined that eight of them would be detained as material witnesses, and a written statement was taken from each of those eight. The sole woman alien in custody and the two children accompanying her were granted voluntary return to Mexico on the day of defendants' arrests because of the inadequacy of detention facilities. Deportation proceedings were begun against the other eleven aliens and they were deported to Mexico ten days later. The dates are significant. The arrests occurred on April 22, 1978. Initial appearances were made

and bonds were set on April 24. Defendants then had an attorney. The eleven aliens in question were deported on May 2.

At the preliminary hearing on May 3, an INS agent unintentionally misinformed defendants' counsel that nineteen aliens remained in custody, including the eleven who had actually been deported the previous day. On June 16, defendants moved for dismissal because of the Government's failure to provide the names of the deported aliens and make them available for interviews. The district court denied the motion to dismiss, but ordered the Government to furnish the names and addresses of the witnesses. The aliens resided in Mexico, however, and were not available to be interviewed or deposed by defendants'

counsel.

Defendants Avila, Perez, Salazar and Sanchez were convicted of conspiracy, 18 U.S.C.A. § 371, to encourage or induce the entry of illegal aliens into the United States in violation of 8 U.S.C.A. § 1324(a)(4), and to transport those aliens within the United States in violation of 8 U.S.C.A. § 1324(a)(2). Avila was also convicted on six counts for violating 8 U.S.C.A. § 1324(a)(4), and Perez was convicted on eight counts for violating 8 U.S.C.A. § 1324(a)(2).

Deportation of Witnesses

Relying on United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971), defendants argue the Government violated their Fifth Amendment right to due process and their Six Amendment

right to compulsory process by deporting the potential witnesses before defendants were notified of their impending deportation and given an opportunity to interview them. In Mendez-Rodriguez, defendant was charged with violations of 18 U.S.C.A. § 371 and 8 U.S.C.A. § 1324(a)(2) and convicted on the basis of testimony of three aliens who had been detained in the United States pending his trial. In reversing the convictions, the Ninth Circuit held that defendant's Fifth and Sixth Amendment rights were violated by the deportation to Mexico of three other alien witnesses before defendant had an opportunity to interview them. The court held the defendant was not required to show prejudice resulting from the unavailability of the deported witnesses. See also

United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974).

The Seventh Circuit adopted the rule of Mendez-Rodriguez in United States v. Calzada, 579 F.2d 1358, cert. dismissed, 439 U.S. 920 (1978). That decision affirmed the district court's dismissal of indictments against eight defendants because seven of thirteen potential alien witnesses had been made unavailable by the Government for interviewing by defendants. The court based its decision solely on the right to compulsory process, and rejected the Government's argument that defendants would be entitled to relief only on a showing of either prosecutorial bad faith or prejudice to defendants.

The effect of Government conduct such as this has not heretofore beed addressed by our Court. The opinion in Uribe v. United States, 529 F.2d 742 (5th Cir. 1976), specifically reserved the issue for later determination:

> Because of our resolution of this question, we need not decide whether we agree with the Ninth Circuit that due process is denied when the Government deports potential witnesses before the defendant has an opportunity to interview them. United States v. Mendez-Rodriguez, 9 Cir. 1971, 450 F.2d 1.

529 F.2d at 743 n 3.

[1] We agree with the Ninth and Seventh Circuits that a criminal defendant's constitutional rights are violated if an alien witness is deported before the defendant is given opportunity to interview the witness. The reasoning of those cases appears sound and we adopt it as our own, without repetition here. We disagree, however, with the automatic reversals and indictment dismissals which occurred in those cases.

We base the affirmance of these convictions on two rationales. First, defendants' interest in the deported aliens heightened once they were unavailable, and the case is flavored with an element of waiver, even though defendants' conduct is not clothed with a full-dress waiver of constitutional right. Of. United States v. Lujan-

Castro, 602 F.2d 877 (9th Cir. 1979) (defendant knowingly waived right to have alien witnesses retained in the United States).

Defendants were arrested and the illegal aliens taken into custody on April 22, 1978. Complaints issued against defendants on April 24, notifying them of the crimes with which they were charged. That same day defendants were represented by counsel at initial appearances before the court. More than a week after the initial appearances, on the tenth day after the defendants' arrests, the eleven aliens were ordered deported to Mexico by a special inquiry officer of the INS.

Although defense counsel asserted that he had inquired about the names and

location of the aliens on or about April 24, the district judge noted that defense counsel failed to show that he had made any efforts to follow up that informal inquiry.

A requirement that defendants act diligently to preserve the testimony of illegal aliens must by imposed in the circumstances of these cases. Otherwise, the great burden and expense of detaining and housing alien witnesses is borne by the Government, while defendants delay the simple efforts involved in locating and interviewing them. Although detention methods involving parole or work programs rather than incarceration would be less burdensome to the Government, these entail the risk of escape by the alien, defeating the purposes of both detention for trial and

deportation. See United States v. Verduzco-Macias, 463 F.2d 105 (9th Cir.), cert. denied, 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed2d 139 (1972).

Defendants could have preserved the testimony of the eleven deported witnesses by making a prompt formal request for their names and whereabouts. If there had been insufficient time to interview all the witnesses, a postponement of their deportation could have been sought. Any alien believed by defendants to be able to give exculpatory testimony could have been detained in this country until trial.

[2] Since we believe, however, that the better procedure for protecting the constitutional rights here involved would be for the Government to give

notice of prospective deportation and a reasonable opportunity for defense counsel to interview the witnesses, we are not comfortable with resting an affirmance on the ground of waiver alone.

The second and more compelling rationale for this decision is that not the slightest suggestion has been made as to what testimony helpful to defendants these witnesses could offer. We are in general accord with the proposition set forth in Mendez-Rodriguez and Calzada that to obtain relief in a case of this kind, the defendant need not show prejudice arising from the violation with "any degree of assuredness." 579 F.2d at 1362. But we agree with the dissents in both of those cases that reversal is not

warranted where the "record is completely devoid of anything which would suggest that the testimony of any one, or more, of the deported persons would have been helpful" to the defendants, 450 F.2d at 6, and that "it does not seem too much to require that they offer at least a plausible theory" of how the testimony of the witnesses would be helpful to the defense. 579 F.2d at 1365. The purpose of a criminal trial is to produce evidence which shows the truth. The purpose of criminal procedure is to assure that end through fair means. It is important to remember that the defendants presumably know the truth in this case. It does not damage the underlying purposes of the Fifth Amendment to require that at least in counsel's brief or argument, some

suggestion be made as to how the deported witnesses might advance the cause of revealing the truth.

Nothing in the record permits an inference that defendants were prejudiced by the unavailability of the alien witnesses. An INS agent testified that each of the aliens related basically the same story, and that the decision as to deportation turned on the superior health and fitness of the aliens chosen for detention. Proof of conspiracy focused on transactions between various defendants and the aliens who testified at trial, not those who were deported. Prosecution of the substantive counts was based on the illegal entry and transportation of the aliens who testified at trial, not those who were deported.

Thus, while adhering to the principles set forth in the Ninth and Seventh Circuit cases, we refuse to blindly apply those principles where there is no suggested suspicion that the deported witnesses could give testimony which would affect the trial in any way at all. We need not here decided with what strength any such theory of helpfulness would need to be advanced by counsel to justify relief. All we do is hold that where there is nothing, reversal is not required.

We especially note that the Government neither acted in bad faith nor purposefully deprived defendants of their rights. Now that the Government knows we subscribe to the rule that defendants have a constitutional right

to interview such witnesses, and must be given reasonable notice before their deportation, this decision will not necessarily immunize subsequent similiar conduct. Likewise, our comments here about the need for counsel to act promptly should suggest that purposeful delay which imposes on the Government the hardship of retaining witnesses not needed in good faith by the defense will be of little avail.

Duplicity

[3] Defendants sought dismissal of Count One of the indictment for duplicity because it alleged conspiracy to commit two distinctive substantive offenses, the inducement of illegal alien entry and the transport of

illegal aliens. "The fact that the alleged conspiracy includes the violation of more than one federal statute does not make [the indictment] duplicitous." Overstreet v. United States, 321 F.2d 459, (5th Cir. 1963), cert. denied, 376 U.S. 919, 84 S.Ct. 675, 11 L.Ed.2w 614 (1964).

[4] The failure of the guilty verdict to specify which substantive crime was determined to be the object of the conspiracy is not prejudicial. Once a defendant is found guilty of participating in a conspiracy, it is "unnecessary that the verdict specify the particular statutory provision which an individual defendant conspired to violate." United States v. Bolts, 558 F.2d 316, 325-326 (5th Cir.), cert. denied, 434 U.S. 930, 98 S.Ct.

417, 54 L.Ed.2d 290 (1977).

Search and Seizure

The district court refused to suppress three types of evidence: Salazar's statements at the time of her arrest, the testimony of the detained witnesses, and certain sums of money taken from the defendants upon arrest. Defendants argue this evidence was obtained as the result of illegal arrests and should have been suppressed. United States v. Cruz, 581 F.2d 535, (5th Cir. 1978) (en banc). See United States v. Ceccolini, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978).

[5] The Constitution does not require that a warrant issue prior to an arrest based on probable cause, even if no

exigent circumstances prevented the obtainment of a warrant. United States v. Watson, 423 U.S. 411, 423-424, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976). The test is whether or not the INS agents had probable cause at the time the arrests occurred:

> Probable cause exists when the facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.

United States v. Lowery, 436 F.2d 1171, 1174 (5th Cir. 1970), cert. denied, 401 U.S. 978, 91 S.Ct. 1208, 28 L.Ed.2d 329 (1971), citing Draper v. United States, 358 U.S. 307, 313, 79 S.Ct. 329, 3 L.Ed.

2d 327 (1959).

[6] The INS agents clearly had probable cause to arrest defendants. An agent testified he had dealt with the informant on twenty prior occasions and was convinced of his reliability. Moreover, the informant's detailed information about the aliens' whereabouts, Salazar's appearance, and the presence of a woman alien accompanied by two children was corroborated by the agents' personal observations soon after surveillance began. See United States v. Tuley, 546 D.2d 1264 (5th Cir.), cert. denied, 424 U.S. 837, 98 S.Ct. 128, 54 L.Ed.2d 99 (1977). Finally, an agent observed through a window that more people were concealed in the camper than he had seen enter. This served to corroborate the informant's allegation of criminal

conduct, especially in view of the lengthy time the truck remained in the parking lot. See United States v. Smith, 598 F.2d 936, 939-940 (5th Cir. 1979).

[7,8] The searches of defendants incident to their lawful arrests were clearly proper, United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), even though the searches took place at the courthouse rather than at the sites of the arrests. United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974); United States v. Castro, 596 F.2d 674, 677 (5th Cir.), cert denied, _____U.S._____, 100 S.Ct. 448, 62 L.Ed.2d_____(1979). The agent had probable cause for the search of the camper shell, so the testimony of the illegal aliens discovered therein

was properly admissible. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); United States v. Wright, 588 F.2d 189, 193 (5th Cir. 1979). Moreover, there was reason for concern that the aliens might flee if not taken promptly into custody. The district court did not err in admitting the evidence resulting from defendants' arrests and the accompanying searches.

Sufficieny of the Evidence

[9, 10] Defendants challange the sufficiency of the evidence to support the convictions. The essential elements of criminal conspiracy are an agreement between two or more persons to commit a crime and an overt act in furtherance of the agreement by one of the conspirators. United States v. White, 569 F.2d 263,

266 (5th Cir. 1978], cert. denied, 439 U.S. 848, 99 S.Ct. 148, 58 L.Ed.2d 149 (1979). Once the existence of the conspiracy is established, there must be substantial evidence that each alleged conspirator knew of, intended to join and participated in the conspiracy. United States v. Malatesta, 590 F.2d 1379 (5th Cir.) (en banc), cert. denied, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979).

[11] The evidence is viewed in the light most favorable to the Government. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942). In this case the evidence establishing the essential elements of conspiracy and defendants' knowledge, intent and participation therein is sufficient. Several weeks before their arrests, Salazar, Sanchez and Perez entered

Mexico and recruited the aliens in Juarez, arranging to transport them to Chicago or Denver. Perez later returned to Mexico, and on the morning of April 22, 1978, he supervised the transportation of the aliens by municipal bus from downtown Juarez to an abandoned house near the border.

Avila and several unknown persons escorted the aliens to the border, where Avila crossed first, ascertained that no INS patrols were present, and signalled the aliens to follow. He then walked the aliens to a pickip point, from which they were driven into El Paso. Sanchez and Avila collected fees from the aliens for the conspirators assistance in bringing them into the United States. Additional payments were to be made after the aliens secured employment in Chicago and Denver.

As thus described by the testimony of the eight alien witnesses, the activities engaged in by defendants were not "random" or "separate", but rather evinced "continuous planning and cooperation [among] the persons involved." United States v. Michel, 588 F.2d 986, 995 (5th Cir.), cert. denied, _____ U.S._____, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979).

[12] Avila also challenges the sufficiency of the evidence by which he was convicted on six counts of encouraging and inducing the aliens' entry into the United States, in violation of 8 U.S.C.A. § 1324(a)(4). The testimony of the alien witnesses fairly established that Avila met them across the border, assisted their transportation to the river, told

them he would signal from the other side when it was safe to cross, scouted the vicinity for law enforcement officers, then called, whistled and waved to the aliens to indicate the right time for crossing. The surreptitious manner in which Avila led the aliens across the border and his subsequent acceptance of cash payments in exchange for that guidance amply support an inference of his knowledge that they were not lawfully entitled to enter the United States, and of the willfulness of his activity. See United States v. Boerner, 508 F.2d 1064, 1068 (5th Cir.), cert. denied, 421 U.S. 1013, 95 S.Ct. 2419, 44 L.Ed.2d 681 (1975). From this evidence, a jury could reasonably conclude that Avila encouraged or induced entry of illegal aliens into the United States.

[13] Perez met the aliens in Mexico,

coordinated their illegal entry into the United States, and was apprehended in El Paso while driving a truck in which they were passengers. The evidence is sufficient to establish his violations of 8 U.S.C.A. § 1324(a)(2), the transportation of illegal aliens within the United States.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-5575

D.C. Docket No. EP-78-CR-147

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAXIMO AVILA-DOMINGUEZ,
ALBERT PEREZ, EVANGELINE SALAZAR
and CAROLYN SANCHEZ,

Defendants-Appellants.

Appeal from the United States
District Court for the Western
District of Texas.

Before WISDOM, AINSWORTH and RONEY,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Western

District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby, affirmed.

February 1, 1980

ISSUED AS MANDATE: MAR 7 1980
(AS TO APPELLANTS ALBERT PEREZ, EVANGELINE SALAZAR, & CAROLYN SANCHEZ)

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-1656

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALBERT PEREZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the indictment should have been dismissed because the government deported potential alien witnesses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 14-48) is reported at 610 F. 2d 1266.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1980. A petition for rehearing was denied on February 28, 1980. The petition for a writ of certiorari was filed on March 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Following a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of conspiring to induce the entry of illegal aliens into the United States (8 U.S.C. 1324(a)(4)) and to transport illegal aliens (8 U.S.C. 1324(a)(2)), in violation of 18 U.S.C. 371. In addition, petitioner Perez was convicted on eight counts of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2). Petitioners were sentenced to five years' imprisonment on the conspiracy charge, and petitioner Perez also received a sentence of five years' imprisonment on each substantive count, suspended in favor of probation, the sentences to run concurrently with each other but consecutive to the sentence on the conspiracy count. Petitioner Salazar was also fined $5,000, and petitioners Perez and Sanchez were each fined $2,500. The court of appeals affirmed (Pet. App. 14-48).[1]

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[1]Co-defendant Maximo Avila-Dominguez, himself an illegal alien (Tr. 94), was also convicted on one count of conspiracy and six counts of inducing illegal aliens to enter the United States, and was sentenced to five years' imprisonment on the conspiracy offense to be followed by concurrent terms of five years' imprisonment on the substantive offenses, also suspended in favor of probation. He has not joined in this petition.

a. The evidence at trial established that petitioners arranged for the illegal entry and transportation of 22 Mexican nationals from Juarez, Mexico, to El Paso, Texas. In April 1978, petitioners Perez and Sanchez met with various aliens at a hotel in Juarez. Each alien agreed to pay petitioners between $200 to $400 for being escorted into this country and for transportation to either Chicago or Denver. Accordingly, on the morning of April 22, 1978, Perez led the group of aliens to a house on the outskirts of Juarez, from which they were taken in small groups to the banks of the Rio Grande River. There, co-defendant Maximo Avila-Dominguez joined the group and, after first crossing the river himself, signaled to the awaiting aliens that it was safe to cross. The 22 Mexicans then crossed over into this country and were led to a pickup truck owned by petitioner Salazar. At that time, each alien paid either Avila-Dominguez or Sanchez an initial $25 fee (Tr. 147-157, 193-199, 220-233, 267-276, 289-297, 312-317, 324-331, 343-346).

Acting on an informant's tip and surveillance, INS agents followed Salazar to the pickup truck, where she rendezvoused with Avila-Dominguez, Sanchez, and Perez. Perez entered the pickup truck and drove away with the 22 aliens. Thereafter, while one of the agents arrested Salazar, Avila-Dominguez, and Sanchez, another agent followed Perez for a short distance and then arrested him. Thereupon, the INS official discovered the 22 aliens in the back of the truck driven by Perez. While searching Sanchez, the agents also found a partial list of the aliens' names. And in response to questioning, Salazar admitted that she drove from Denver to El Paso to pick up the aliens, whom she knew to be in this country unlawfully, and to transport them back to Denver (Pet. App. 22-23; Tr. 42-54, 87-99, 112-116; Gov't Exh. 4).

b. The INS officials also took the 22 illegal aliens into custody on April 22, 1978. The aliens were processed at that time and three of them—the only female alien and her two children—agreed voluntarily to return to Mexico that day (Tr. 100-103, 139).[2] Two days later, defense counsel inquired about the names and location of the aliens but made no further efforts to investigate or to interview the aliens (Pet. App. 23-24, 30-31). Ten days after petitioners' arrest, 11 of the remaining aliens were deported (Tr. 102, 125). Subsequently, petitioners were charged with overt acts and substantive counts solely with regard to the eight remaining Mexicans (Pet. App. 35).

2. Prior to trial, petitioners moved to dismiss the indictment on the ground that the government had deported 14 of the 22 aliens without making them available to the defense or furnishing their names. In response, the government pointed out that petitioners had had an opportunity to interview at least 11 of these witnesses prior to deportation and that the other three aliens (two of whom were children) had voluntarily departed. In addition, an affidvait of the INS criminal investigator stated that the stories told by the aliens who were returned to Mexico were essentially the same as the accounts related by the eight aliens still being held (Pet. App. 35; Tr. 125-126). The district court denied the motion to dismiss, although it ordered the government to furnish petitioners with the names and addresses of the deported aliens. Thereafter, petitioners were convicted on the various charges described above.

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[2]There were limited facilities to house female aliens and no facilities to house children (Tr. 101).

On appeal, the court of appeals rejected petitioners' due process and compulsory process contentions regarding the deported aliens. The court initially stated that it "agree[d] with the Ninth and Seventh Circuits that a criminal defendant's constitutional rights are violated if an alien witness is deported before the defendant is given opportunity to interview the witness" (Pet. App. 29). The court held, however, that dismissal of the indictment was inappropriate here for two reasons. First, the court observed that petitioners' "case is flavored with an element of waiver," because petitioners' counsel failed to interview the aliens in the ten days prior to their deportation despite his awareness of their whereabouts (*id.* at 29-33). Further, the court concluded that petitioners had utterly failed to suggest how the testimony of the deported witnesses would have been at all helpful to their defense (*id.* at 33-36).

ARGUMENT

Relying on *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1 (9th Cir. 1971), and *United States* v. *Calzada*, 579 F. 2d 1358 (7th Cir. 1978), petitioners contend (Pet. 7-11) that the government violated their Fifth and Sixth Amendment rights by deporting 11 aliens, who were potential witnesses, prior to trial. Therefore, in petitioners' view, the courts below should have dismissed the indictment against them even though the specific charges at issue related directly only to aliens who had not been deported by the government. The court of appeals correctly rejected these claims both because petitioners failed to interview the aliens prior to deportation despite a substantial opportunity to do so and also because the deportations did not prejudice petitioners' defense. And contrary to petitioners' contentions, the decision in the instant case is consistent with the relevant decisions of the Seventh and Ninth Circuits.

1. Petitioners failed to interview or otherwise to preserve the testimony of the 11 aliens who were deported,[3] despite a substantial opportunity to do so prior to their deportation. The INS agents arrested petitioners and the aliens on April 22, 1978. Although petitioners' counsel was fully aware of the status and circumstances of the aliens at that time (Pet. App. 30-31), he made no attempt to contact or interview any of the incarcerated aliens in the 10-day period between their arrest and deportation. In these circumstances, as the court of appeals suggested (*id.* at 29-33), petitioners may not now be heard to complain. See, *e.g.*, *United States* v. *Lopez*, 615 F. 2d 1363 (Table) (6th Cir. 1980), petition for cert. pending, No. 79-6554; *United States* v. *Lujan-Castro*, 602 F. 2d 877 (9th Cir. 1979); *United States* v. *Romero*, 469 F. 2d 1078, 1079 (9th Cir. 1972), cert. denied, 410 U.S. 985 (1973); see also *United States* v. *Neustice*, 452 F. 2d 123 (9th Cir. 1971). Otherwise, the government would be required to retain custody over large groups of aliens for indefinite periods of time at a tremendous cost in both practical and humanitarian terms.

Furthermore, petitioners, who were arrested as they were transporting the illegal aliens from the border area,[4] have never suggested how the aliens' putative testimony

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[3]No independent claim is apparently made regarding the voluntary departure of the two juveniles and their mother, who were released for humanitarian reasons. Both the Seventh and Ninth Circuits have recognized that the government may release a juvenile illegal alien in appropriate circumstances. See *United States* v. *Calzada*, *supra*, 579 F. 2d at 1361; *United States* v. *Carrillo-Frausto*, 500 F. 2d 234, 235 (9th Cir. 1974).

[4]In addition, we note that petitioner Salazar admitted that she knowingly participated in the transportation of the illegal aliens (Tr. 98-99). Cf. *United States* v. *Powell*, 498 F. 2d 890 (9th Cir. 1974).

could possibly have aided their defense. The eight aliens who were not deported uniformly and thoroughly implicated petitioners in the illegal immigration conspiracy, and the INS agent testified that the other deported aliens all made virtually identical inculpatory statements regarding petitioners. Since "proof of prejudice is generally a necessary but not sufficient element of a due process claim" (*United States* v. *Lovasco*, 431 U.S. 783, 790 (1977)), petitioners' failure to establish that the deportation of some of the aliens actually prejudiced their defense is fatal to their contentions here. Accord, *United States* v. *Gonzales*, 617 F. 2d 1358, 1363 (9th Cir. 1980); *United States* v. *Sanchez-Murillo*, 608 F. 2d 1314, 1317-1318 (9th Cir. 1979); *United States* v. *Hernandez-Gonzalez*, 608 F. 2d 1240, 1245-1246 (9th Cir. 1979); *United States* v. *Castellanos-Machorro*, 512 F. 2d 1181, 1184 (9th Cir. 1975); *United States* v. *Romero*, *supra*.[5]

2. Petitioners erroneously contend that the decision below is in conflict with various decisions of the Ninth and Seventh Circuits. In *United States* v. *Mendez-Rodriguez*, *supra*, a divided panel of the Ninth Circuit reversed a conviction for conspiring to smuggle and for transporting illegal aliens. The court held that the government's immediate return to Mexico of three of the six alien witnesses deprived the defendant of an opportunity to

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[5]To be sure, where the government immediately deports material alien witnesses, thereby depriving a defendant of any opportunity to interview such witnesses, some courts have concluded that it may be appropriate to presume that the aliens might have been able to give testimony materially helpful to the defense. See, *e.g.*, *United States* v. *Mendez-Rodriguez*, *supra*; *United States* v. *Calzada*, *supra*. Here, of course, petitioners had ample opportunity to interview the aliens, and, accordingly, the normal burden of "proof of actual prejudice" (*United States* v. *Lovasco*, *supra*, 431 U.S. at 789) rests upon petitioners.

interview those potential defense witnesses and therefore violated his Fifth and Sixth Amendment rights. 450 F. 2d at 5. *Mendez-Rodriguez* was followed in *United States* v. *Tsutagawa*, 500 F. 2d 420 (9th Cir. 1974), and *United States* v. *Calzada*, *supra*.[6] In both cases, however, the court of appeals based its decision on the fact that the government's action had deprived the defendant of any opportunity to interview the alien witnesses. See 500 F. 2d at 422; 579 F. 2d at 1362. In addition, both decisions noted that the defendants made good faith efforts to locate the missing witnesses after their deportation. See 500 F. 2d at 422; 579 F. 2d at 1360 n.5. Finally, both decisions emphasized that reversal was not required in every case in which the government deports a putative alien witness. See 500 F. 2d at 422; 579 F. 2d at 1361.[7]

It is thus apparent that petitioners' reliance on *Mendez-Rodriguez*, *Tsutagawa*, and *Calzada* is misplaced. The court of appeals in this case expressly "agree[d] with the Ninth and Seventh Circuits that a criminal defendant's constitutional rights are violated if an alien witness is deported before the defendant is given opportunity to interview the witness" (Pet. App. 29). Here, however, in contrast to the situations in *Mendez-Rodriguez*, *Tsutagawa*, and *Calzada*, petitioners were given an opportunity to interview the witnesses prior to deportation, but they neither contacted the aliens while in

[6]In *Calzada*, a divided panel of the Seventh Circuit concluded that the district court did not abuse its discretion in dismissing the indictment. 579 F. 2d at 1363.

[7]The Seventh Circuit has not had occasion to apply or reconsider the *Calzada* decision. The Ninth Circuit has repeatedly upheld convictions over *Mendez-Rodriguez* claims. See, *e.g.*, *United States* v. *Gonzales*, *supra*; *United States* v. *Sanchez-Murillo*, *supra*; *United States* v. *Hernandez-Gonzalez*, *supra*; *United States* v. *Castellanos-Machorro*, *supra*; *United States* v. *Carrillo-Frausto*, *supra*; *United States* v. *Romero*, *supra*.

custody nor attempted to locate them thereafter. Moreover, petitioners failed to suggest how they " 'could conceivably' benefit from [the] missing witness[es'] testimony [or how they were] prejudiced by the[ir] absence." *United States* v. *Gonzales*, *supra*, 617 F. 2d at 1363. In such circumstances, neither the Seventh nor the Ninth Circuit would reverse petitioners' convictions. See, *e.g.*, *ibid*; *United States* v. *Sanchez-Murillo*, *supra*, 608 F. 2d at 1318; *United States* v. *Calzada*, *supra*, 579 F. 2d at 1362; *United States* v. *Castellanos-Machorro*, *supra*, 512 F. 2d at 1183-1184; *United States* v. *Romero*, *supra*, 469 F. 2d at 1079.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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